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Supreme Court, U.S.
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No. 04-910

IN THE

Supreme Court of the United States

MAURICE CLARETT,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit, consistent with the decisions of every other court to address the scope of the non-statutory labor exemption to the antitrust laws, correctly held that the exemption applies to a collectively bargained rule governing the eligibility of players for the National Football League's annual draft.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are named in the caption. Respondent National Football League is an unincorporated association consisting of thirty-two member clubs. The National Football League does not issue stock.

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STATEMENT OF THE CASE

Petitioner Maurice Clarett seeks review of a unanimous decision of the United States Court of Appeals for the Second Circuit holding that the non-statutory labor exemption bars his antitrust action against the National Football League. Clarett challenged, under Section 1 of the Sherman Act, 15 U.S.C. § 1, a long-standing NFL rule, to which the NFL players' union had agreed in collective bargaining, requiring players to be three years beyond their high school graduation in order to be eligible for the NFL draft. The Court of Appeals' decision is in full accord with this Court's precedent, as well as with the holdings of the other circuit courts, regarding the scope and application of the non-statutory exemption.

1. Relevant Facts.

The NFL is an unincorporated association of thirty-two member clubs; the League's Constitution and Bylaws set forth the NFL's policies and procedures. The Constitution and Bylaws have provided since 1990 that a player is not eligible for selection in the NFL draft until three football seasons have elapsed since his high school graduation. C.A. App. 129.

Since May 1993, a collective bargaining agreement ("CBA") between the NFL's multi-employer bargaining unit, the NFL Management Council, and the players' authorized collective bargaining representative, the National Football League Players' Association ("NFLPA"), has governed the terms and conditions of employment of NFL players. *Id.*

When it executed the CBA in 1993, the NFLPA agreed to certain then-existing provisions of the NFL Constitution and Bylaws, including the challenged eligibility rule. The CBA contains an explicit commitment by the NFLPA not to challenge those provisions, C.A. App. 157, and an express waiver by the NFLPA of its right, for the

duration of the CBA, to bargain over those provisions, *id.* at 155. The parties confirmed in a letter agreement, executed contemporaneously with the CBA, that the challenged eligibility rule is one of the provisions to which the NFLPA agreed. *Id.* at 165–72. The rule itself was specifically addressed during the course of collective bargaining that led to the CBA. *Id.* at 140.

Petitioner, who graduated from high school in December 2001, was not eligible for selection in the most recent NFL Draft, held in April 2004. *Id.* at 129. Petitioner will be eligible for selection in the next NFL Draft, scheduled for April 2005.

2. Proceedings in the District Court.

Petitioner filed suit in September 2003 in the United States District Court for the Southern District of New York, alleging that the NFL draft eligibility rule constitutes a *per se* violation of the Sherman Act; he sought damages for his allegedly wrongful exclusion from the 2003 NFL Draft as well as an order declaring him eligible for selection in the 2004 NFL Draft. C.A. App. 7.

Pursuant to an expedited briefing schedule, *id.* at 15, the NFL moved for summary judgment on two grounds: (i) that the non-statutory labor exemption barred the claim; and (ii) that because of market conditions established by the CBA, Petitioner could not demonstrate antitrust injury. *Id.* at 129, 183. Petitioner also moved for summary judgment, claiming that the eligibility rule was a group boycott constituting a *per se* violation of Section 1 of the Sherman Act. *Id.* at 133.

On February 5, 2004, the District Court (Scheindlin, J.), without hearing oral argument, denied the NFL's motions and granted summary judgment for Petitioner, holding that the challenged eligibility rule is a "naked restraint of trade" and determining that "[b]ecause the NFL cannot prevail on

[its non-statutory labor exemption or antitrust injury defenses], the Rule must be sacked." Pet. App. 50, 2. The District Court ordered that Petitioner be deemed eligible for selection in the 2004 NFL Draft. *Id.* at 60.

The NFL promptly moved for a stay pending appeal; the District Court denied that motion on February 11, 2004, C.A. App. 619–35, after which Petitioner dropped his claim for damages associated with his alleged exclusion from the 2003 NFL Draft. *Id.* at 633. The District Court entered final judgment on February 18, 2004, and the NFL noticed its appeal immediately thereafter. *Id.* at 194.

3. Proceedings in the Court of Appeals.

Faced with the possibility that, absent a stay, its appeal could become moot if Petitioner were selected in the 2004 NFL Draft (scheduled for April 24–25), the NFL immediately sought a stay, or in the alternative, expedited review, in the Court of Appeals. On March 30, 2004, after more than an hour of oral argument, the Second Circuit (Cabranes, Feinberg, and Pooler, JJ.) granted the NFL's request for expedited review, set an accelerated briefing schedule, scheduled oral argument on the merits for April 19, 2004, and referred the NFL's stay motion to the merits panel.

On April 19, 2004, soon after oral argument on the merits, the Second Circuit (Sotomayor and Sack, Circuit Judges; Kaplan, District Judge, sitting by designation) granted the NFL's motion for stay, citing, among other things, the League's "likelihood of success on the merits." Resp. App. 2a. The next day, Petitioner applied to Justice Ginsburg, as Circuit Justice, to vacate the stay; that application was denied. *See In re Clarett v. Nat'l Football League*, No. 03A870 (U.S. Apr. 22, 2004). Petitioner then refiled his application with Justice Stevens, who denied it the same day. *See id.*

On May 24, 2004, the Second Circuit issued its decision on the merits, unanimously holding that the non-statutory labor exemption barred Petitioner's claim, and reversing and remanding with instructions to enter judgment for the NFL. *See* Pet. App. 61–97.

The Second Circuit denied Petitioner's petition for rehearing or rehearing en banc on October 15, 2004. *Id.* at 98.[1]

REASONS FOR DENYING THE WRIT

In the nearly sixty-five years since this Court first recognized the non-statutory labor exemption, no court of which we are aware has ever deemed unlawful under the Sherman Act a restraint, agreed to in collective bargaining, that principally affected competition in a labor market. This Court and the lower federal courts consistently have held that such restraints are the exclusive province of the labor laws. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) ("[I]t would seem plain that restraints on the sale of the employee's services to the employer ... are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act."); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) ("The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working

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[1] Due in large part to his own litigation choices, the practical importance of this case to Petitioner has diminished over time. In order to secure a prompt resolution of his claim for attorneys' fees, Petitioner elected, immediately after he prevailed in the District Court, to drop his claim for damages associated with the 2003 Draft. He failed to seek preliminary injunctive relief during the 2004 NFL season, which of course is now over. And Petitioner is eligible for the 2005 NFL Draft, so there are neither injunctive nor damages issues presented with regard to future seasons. In short, Petitioner's stake in this action is now limited to damages for the 2004 NFL season.

conditions."); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236–37 (1996) ("[The non-statutory labor exemption] substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.").

Because "the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship," Pet. App. 78–79, the Second Circuit's decision below is fully in accord with this unbroken line of authority. The Court of Appeals' decision squarely reflects the fundamental principles underlying the non-statutory labor exemption, which seeks to reconcile "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in *business* markets." *Connell Constr. Co.*, 421 U.S. at 622 (emphasis added).

No federal antitrust interest is implicated by a collectively bargained agreement with a single employer that "restrains" competition over terms and conditions of employment. *See* IA Phillip E. Areeda & Donald K. Hovenkamp, *Antitrust Law* ¶ 256a (2d ed. 2000) ("The simplest agreement between an employer and a union representing employees needs no antitrust immunity, for no antitrust laws are violated."). At the same time, the federal labor laws strongly encourage *multi-employer* collective bargaining. *See NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 95 (1957) (characterizing multi-employer bargaining as a "vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining"); *Brown*, 518 U.S. at 240–41 (same).

In these circumstances, the appropriate balance of federal labor law and federal antitrust law is clear: Subjecting to potential antitrust liability agreements reached in multi-employer bargaining – agreements that unquestionably would

be lawful if entered into by a single employer – would inevitably undermine federal labor policy, a consequence against which this Court expressly warned in *Brown*. *See* 518 U.S. at 242 ("[T]o permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for the antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires."). That would be true in any industry, but it is especially true with respect to professional sports, in which league members function "more like a single bargaining employer" than separate employers. *Id.* at 249.

The justifications for review asserted in the petition take no regard of the foregoing principles. As we further demonstrate below, the petition rests on illusory distinctions drawn from dictum in a nearly thirty-year old opinion addressing a restraint to which the union had *not* agreed. *See Mackey v. National Football League*, 543 F.2d 606, 615–16 (8th Cir. 1976). That dated decision has no relevance here.

The grounds for certiorari advanced by Petitioner mirror the unfounded arguments thoroughly rejected by the Court of Appeals. Tracking the three-part test set forth in *Mackey*, Petitioner contends that the challenged eligibility rule is not within the scope of the non-statutory labor exemption because the rule (i) does not concern a mandatory subject of collective bargaining; (ii) primarily affects prospective, rather than current, employees; and (iii) was not the product of good faith, arms' length negotiations between the League and the players' union. Petitioner is wrong in all three respects.

1. Mandatory vs. Permissive Subject of Bargaining.

As an initial matter, there is no serious question that the challenged eligibility rule is a mandatory subject of

collective bargaining.[2] The federal courts are *unanimous* in holding that player drafts in professional sports leagues constitute mandatory bargaining subjects protected by the non-statutory exemption. *See, e.g., Wood v. National Basketball Ass'n*, 809 F.2d 954, 962 (2d Cir. 1987) (NBA draft); *White v. National Football League*, 836 F. Supp. 1458, 1501 (D. Minn. 1993) (NFL draft), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *Powell v. National Football League*, 711 F. Supp. 959, 962 (D. Minn. 1989) (NFL draft); *Zimmerman v. National Football League*, 632 F. Supp. 398, 404 (D.D.C 1986) (NFL supplemental draft); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 744 (D.D.C. 1976) (discussing "the fairly clearly mandatory bargaining nature" of NFL draft), *rev'd, in part, on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978). If professional sports leagues and their players are *required* to bargain over the rules governing player drafts, then it follows *a fortiori* that rules establishing *eligibility* for player drafts also are mandatory bargaining subjects. *Cf.* Pet. App. 90 (draft eligibility rules "represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject"); *see also Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1061–62 (2d Cir. 1995) ("Free agency for veteran players may ... be combined with a reserve system, as in baseball, or a rookie draft, as in basketball, for newer players. A salary cap may or may not be included. *To hold that any of these items, or others that make up the mix in a particular sport, is merely a permissive subject of bargaining would ignore the reality of collective bargaining in sports.*" (emphasis added and citations omitted)).

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[2] Mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). All other lawful areas of negotiation are considered "permissive subjects." *See NLRB v. Wooster Div. of Borg Warner Corp.*, 356 U.S. 342, 349 (1958).

Draft eligibility rules are mandatory subjects for a separate and additional reason: they "vitally affect" the terms and conditions of current players' employment. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210–15 (1964). At issue in *Fibreboard* was the "contracting out" of work to non-union employees; this Court held that the practice was a mandatory subject, even though it directly involved only non-union workers, because it "necessarily result[ed]" in the termination of union members' employment. *Id.* at 210; *see also Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179–80 (1971) (discussing *Fibreboard* and "vitally affects" test).

Just as the practice of "contracting out" work to non-union employees "vitally affected" the interests of union members in *Fibreboard*, so too does the challenged draft eligibility rule "vitally affect" the interests of all current NFL players. The rule protects the job security of current NFL players because it limits the number of prospective players eligible to compete for NFL roster spots; it protects the wages of current players for similar reasons. *See Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294–95 (1959) ("minimum rental" provision applicable only to non-union truck drivers was mandatory subject because its object was "the maintenance of the basic wage structure established by [the CBA]"; holding provision immune from challenge under state antitrust laws); Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining: Of Superstars in Peonage*, 81 Yale L.J. 1, 16 (1971) ("The method by which new players enter has an enormous effect on those already in the unit and the collective agreement which governs them.").[3]

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[3] Petitioner's reliance on the unenforced decision of the NLRB in *Star Tribune*, 295 N.L.R.B. 543 (1989), is unfounded. *Star Tribune* had (continued...)

In any event, Petitioner's insistence that the rule does not concern a mandatory bargaining subject is a red herring. No appellate court of which we are aware has ever declined to apply the exemption because the challenged restraint did not concern a mandatory subject. And this Court's precedents confirm that the exemption extends to agreements concerning permissive subjects that (i) are "intimately related" to legitimate objects of union concern and (ii) focus principally on the labor, as opposed to the business or output, market. *See, e.g., Local Union 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676 (1965).

Jewel Tea applied the exemption to a collectively bargained provision limiting the time during which grocery stores could sell pre-packaged meats; the restraint was held immune from antitrust challenge because it was "*intimately related to* wages, hours and working conditions" of the butcher-employees. *Id.* at 689 (White, J.) (emphasis added). By including within the scope of the exemption restraints "intimately related to" mandatory subjects, Justice White made clear that the exemption is not limited to such subjects. The "crucial determinant" is not the mandatory or permissive nature of the challenged restraint, but rather its "relative impact on the product market and the interests of the union members." *Id.* at 690 n.5.

Following *Jewel Tea*, numerous courts of appeals have recognized that the exemption extends to agreements

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nothing to do with the labor exemption. Moreover, unlike the record here, the record in *Star Tribune* contained no evidence about the impact of the conduct at issue (applicant drug-testing) on current employees. *See id.* at 547–48 & n.16. Accordingly, that decision affords no basis for challenging the Second Circuit's conclusion that the eligibility rule "vitally affects" the interests of current NFL players, Pet. App. 91, and it surely offers no basis for this Court's review of the Second Circuit's decision. *See* S. Ct. R. 10(a).

concerning non-mandatory bargaining subjects. *See, e.g., Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1474–75 (5th Cir. 1993) (exemption applied to non-mandatory "interests arbitration clause"); *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 & n.13 (3d Cir. 1983) (non-statutory labor exemption "generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory *or permissive* subjects of bargaining" (emphasis added)); *Home Box Office, Inc. v. Directors Guild of Am., Inc.*, 531 F. Supp. 578, 609 (S.D.N.Y. 1982) ("*Whether or not* the particular provision ... would be a mandatory subject of bargaining, provisions with just the same purpose and effect were found within the nonstatutory exemption in *Jewel Tea* ...." (emphasis added)), *aff'd on op. of dist. ct.*, 708 F.2d 95 (2d Cir. 1983); *cf. Berman Enters. Inc. v. Local 333, United Marine Div., Int'l Longshoremen's Ass'n*, 644 F.2d 930, 935 (2d Cir. 1981) ("agreements reached on nonmandatory subjects of bargaining ... are not within the nonstatutory exemption *if they constitute restraints on competition in a business market*" (emphasis added)). *See generally* IA Areeda & Hovenkamp, *supra*, ¶ 257 n.28 ("[T]he immunity can also extend to multi-employer agreements covering permissive, or nonmandatory, subjects of collective bargaining.").[4]

In short, at least in circumstances where the union has agreed to the challenged restraint, the distinction between mandatory and permissive bargaining subjects does not affect application of the exemption. Even if this Court were to find that the challenged restraint concerns a permissive subject,

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[4] As this Court reaffirmed in *Brown*, "implied antitrust immunities ... extend beyond the statutorily *required* joint action [*i.e.*, mandatory action] to joint action that a statute expressly or impliedly allows [*i.e.*, permissive action] ...." 518 U.S. at 244–45 (emphasis in original; internal quotations and citations omitted).

the circuit "conflict" that Petitioner premises on that distinction would be entirely illusory.

2. Prospective vs. Current Employee.

Petitioner's status as a "prospective" employee – as opposed to a current employee – similarly provides no basis for challenging the Second Circuit's decision. No court of which we are aware has ever relied on such a distinction to hold that the non-statutory exemption should not apply to a challenged restraint.

Petitioner's selective quotations from *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), badly miss the mark. The "outsiders" in those cases – employers and their competitors – alleged restraints on competition not in the labor/input market, but rather in the business/output market. Here, in contrast, the alleged restraint is of a *labor* market; that fact, rather than the identity or status of the plaintiff, is the key factor in determining whether the exemption applies. *See Connell Constr. Co.*, 421 U.S. at 622 (non-statutory labor exemption accommodates "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in *business* markets" (emphasis added)); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 893 (7th Cir. 1982) ("[A] complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption. ... The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny."); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 514 (3d Cir. 1979) ("[T]he rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working

conditions. Restraints operating on that [*i.e.*, the labor] market are presumptively outside the scope of the Sherman Act.").[5]

In any event, Petitioner is by no means a "stranger" to the collective bargaining relationship, as he contends. *See* Pet. 10. Put simply, he seeks to avail himself of the benefits of that relationship – including collectively bargained terms and conditions of NFL employment such as guaranteed minimum salaries, medical care, and retirement plans – without satisfying the collectively bargained eligibility requirements with which every other NFL player-employee has complied. Such circumvention of the collective bargaining process is expressly proscribed by the federal labor laws, and would serve no purpose under the federal antitrust laws. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) ("[Labor policy] extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944) ("The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees ... [and] exacts 'the negative duty to treat with no other.'") (citations omitted).

Collective bargaining agreements routinely include terms and conditions of employment, such as seniority provisions and hiring hall arrangements, that benefit current employees to the detriment of new and prospective employees. *See, e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S.

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[5] Petitioner's disregard of the principles underlying the non-statutory exemption is explained in part by his failure to recognize any distinction between the labor/input market and the product/output market. *See, e.g.*, Pet. 13 ("So-called 'product' and 'labor' markets are so intertwined and interconnected that they cannot be distinguished from one another.").

330, 338–39 (1953) (upholding collectively bargained seniority provisions); *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 675–77 (1961) (upholding union hiring halls). At bottom, Petitioner complains that the Second Circuit failed to create an exception to the non-statutory labor exemption for collectively bargained agreements containing such provisions. No decision of which we are aware supports such an exception, which would undermine established federal labor policy in numerous respects.[6]

3. The Form of the Agreement.

Because the challenged eligibility rule appeared first in the NFL Constitution and Bylaws and was then endorsed by the union through CBA provisions and a contemporaneous side letter (*see* pp. 1–2, above), Petitioner argues that the rule is not the product of good faith, arms'-length negotiations and therefore falls outside the scope of the labor exemption. Pet. 24–25. Petitioner's *premise*, a classic elevation of form over substance, presents a purely factual question painstakingly addressed by the Court of Appeals. *See* Pet. App. 65–69, 94–95. His *conclusion* cannot be reconciled with this Court's holding in *Brown*, which squarely rejected the contention that "the implicit exemption applies only to labor-management *agreements*." 518 U.S. at 243 (emphasis in original).

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[6] Petitioner claims to find support for his position in this Court's decision in *Brown*, but his analysis of that case is not nearly as strong as his rhetoric. *See* Pet. 16 (alleging that the Second Circuit "misused *Brown*" and reached a result "in defiance" of this Court's express "reservations" in *Brown*). The only "reservations" expressed in *Brown* concerned the need for the Court to decide (or its ability to decide) in that case the *duration* of the exemption when applied to terms and conditions *imposed* by employers over a union's objection. *See* 518 U.S. at 250. Such "reservations" have no conceivable relevance here.

Undisputed evidence demonstrated that the NFL and the NFLPA, following good faith, arms'-length collective bargaining, reached agreement with respect to the challenged eligibility rule.[7] The fact that the agreement is partially reflected in an explanatory side letter is of no consequence under either the antitrust laws or the labor laws. And there is no basis for this Court to disturb the Court of Appeals' thorough assessment of this fact-bound issue. *See NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing writ of certiorari as improvidently granted where petition presented "primarily ... a question of fact"); *Rudolph v. United States*, 370 U.S. 269 (1962) (same).

In this respect, among others, this case is fundamentally different from *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), upon which Petitioner principally relies. In *Mackey*, the court found that the union had not agreed to the challenged restraint; on that basis, it held that the labor exemption did not apply. *Id.* at 615-16. Here, in contrast, the union *did* agree to the challenged restraint. The distinction is important, because where the

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[7] In Article III of the CBA (entitled "Scope of the Agreement"), the NFLPA expressly "waive[d] all rights to bargain with . . . [the NFL clubs] concerning ... the provisions of the NFL Constitution and Bylaws." C.A. App. 155. In Article IV, the NFLPA agreed that neither it "nor any of its members, agents acting on its behalf, nor any members of its bargaining unit will sue, or support financially or administratively any suit against, the NFL or any Club relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered ...." *Id.* at 157. A collectively-bargained "side letter" agreement executed contemporaneously with the CBA confirmed that the challenged eligibility rule was among the terms of the Constitution and Bylaws to which the foregoing CBA provisions applied. *Id.* at 165–72. Finally, the uncontradicted declaration of NFL Executive Vice President for Labor Relations, Peter Ruocco, established that the "eligibility rule itself was the subject of collective bargaining" between the League and the players' union. *Id.* at 140; Pet. App. 94–95.

union has agreed, the sole question becomes whether the principal effect of the restraint is on the labor market or the business market; the *form* of the agreement is immaterial. *See supra,* pp. 11–12.[8]

* * *

As a general matter, the grounds Petitioner advances in support of certiorari reflect the same mistake that the petitioners made in *Brown*. Petitioner asserts limitations on the non-statutory labor exemption "deduce[d] from [the] case law language," but he utterly fails to take into account "the exemption's rationale." 518 U.S. at 243. Here, the challenged restraint (i) is one to which the union has agreed in collective bargaining, and (ii) restrains competition only in a labor market. Accordingly, the "exemption's rationale" – reconciling "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in *business* markets" – applies with compelling force. *Connell Constr. Co.*, 421 U.S. at 622

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[8] Petitioner misreads *Mackey* as requiring a specific *quid pro quo* from the employer before the exemption can be applied. Such a requirement, which could not in any event be reconciled with this Court's decision in *Brown*, was rejected by every federal court to address the issue, including the Eighth Circuit itself, in the wake of *Mackey*. *See Powell v. National Football League*, 930 F.2d 1293, 1301 (8th Cir. 1989) (NFL's "restricted free agency" system, unilaterally imposed by the League after bargaining to impasse, was immune from antitrust challenge under the labor exemption); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (noting that the non-statutory exemption is not "limited to restraints imposed by collective bargaining agreements"); *Wood*, 809 F.2d at 962 n.5 (emphasizing that "a particular *quid pro quo* [need not] be proven to avoid antitrust liability"); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979) ("That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue."); *Zimmerman v. National Football League*, 632 F. Supp. 398, 407 (D.D.C. 1986) ("[N]othing in either *Mackey* or *McCourt* requires that a *quid pro quo* be contained in the agreement under consideration.").

(emphasis added). There is no authority even hinting that the Second Circuit should have reached, or that another court of appeals would have reached, a different conclusion.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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March 4, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 19th day of April two thousand four,

Present:

Hon. Robert D. Sack,
Hon. Sonia Sotomayor,
Circuit Judges,
Hon. Lewis A. Kaplan,*
District Judge.

*The Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York, sitting by designation.

Maurice Clarett,

Plaintiff-Appellee,

v. No. 04-0943

National Football League, Inc.,

Defendant-Appellant.

We reserve decision on the merits of this appeal. A decision and opinion will follow.

Appellant's motion for a stay pending the resolution of this appeal having been denied by the district court, appellant has moved before this Court for a stay pending the outcome of this appeal of the district court's opinion and order declaring appellee eligible to participate in the 2004 NFL draft. "Four criteria are relevant in considering whether to issue a stay of an order of a district court . . . pending appeal: the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest." Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002).

Appellant has demonstrated a likelihood of success on the merits. And any potential harm done to appellee by granting this motion to stay is sufficiently countermanded by the strength of the other factors weighing in appellant's favor, see id. at 101. Appellant's agreement to hold a supplemental draft for appellee and all others similarly situated also mitigates any harm to the appellee in the event of his ultimately prevailing in this appeal. A stay is thus warranted to safeguard appellant from harm and ensure meaningful review of the issues presented by this appeal.

Upon due consideration, it is hereby **ORDERED** that appellant's motion for a stay pending the resolution of this appeal is **GRANTED**, effective immediately.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By:_____
Elizabeth Cronin
Director, Office of Legal Affairs